No. 15,201

United States Court of Appeals

For the Ninth Circuit

RALPH E. WILLIAMS, as Trustee in Bankruptcy of the Estate of George F. Elliff, an individual doing business as Pine Supply Co., bankrupt, and PEARL K. LANNIN,

Appellants,

vs.

TWIN CITY COMPANY, TWIN CITY LUMBER CO., JOHN W. HUNTER, FRANKLIN SUPPLY CORPORATION, SOUTHWEST MANAGEMENT CORP., H. A. COLLINS, and WILLIAM R. RAMSAY,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division. Honorable O. D. Hamlin, Judge.

APPELLANTS' CLOSING BRIEF.

C. HUNTINGTON JACOBS,
DANIEL R. COWANS,
ROBERT N. JACOBS,
Bank of America Building,
San Jose, California,
Attorneys for Appellants.

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APPELLANTS' CLOSING BRIEF.

Appellants' position is that the bankrupt made transfers and incurred obligations in October which the law forbids as being unfair to other creditors. This position was successfully maintained against Mrs. Lannin in the Bankruptcy Court, and the transaction was set aside as to her. It is quite true that

this decision is not binding on Appellees,[1] as they successfully avoided being joined in the proceeding before the Referee on the grounds of lack of jurisdiction. The action in the court below was brought to complete the task of setting aside the October transfers. As stated in our opening brief, partial relief was given by the trial court on one of the grounds of the complaint. We say it was error not to give full relief asked.

I. SUBJECT OF APPELLANTS' ATTACK.

We set forth our contention that the bankrupt while insolvent made transfers and incurred obligations without the consideration the law demands as a protection to other creditors. Appellees deny the insolvency and due to a misunderstanding, assert there was adequate consideration for the October transaction. They apparently do not understand which transfers and which obligations are being attacked by Appellants.

Before the October transaction the bankrupt owed Appellees some $28,000.00. In October he executed a promissory note to them, *transferred* his interest in his stock in trade and existing accounts receivable to a trust, incurred an *obligation* to transfer future stock in trade and accounts receivable to the trust. Taking all these actions together, there was a so-called fraudulent conveyance.

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[1]In Appellants' Opening Brief Appellees were incorrectly called Respondents.

Appellees apparently feel that Appellants sole attack is on the note. Thus the title of their Point II at page 11 states: "Note was issued for 'fair' consideration". Under Point III in which they claim that the obligation is unjustly attacked, their view that the obligation in question is the note only as shown by the last sentence which reads: "Hence the note (obligation) is not vulnerable to this attack." The title of Point IV at page 14 is: "Note was not issued or received in fraud". The arguments of Appellees under those points proceed accordingly on the sole question of whether the issuance of the note by the Bankrupt to Appellees was permissible.

If nothing more had occurred in October than the giving of the note to Appellees by the Bankrupt, we would not be in this court. If a debt exists, the giving of a promissory note on that debt is neither a transfer nor the creation of an obligation. No consideration would be required where, as here, the debt already existed.

The transaction however is broader than Appellees make it. The transfers in trust and the obligations of further transfers in trust are transfers and obligations which can be and are questioned and attacked. Appellees cannot isolate part of a transaction and claim it valid and ignore the balance of the transaction.

Appellees, considering only a part of the transaction, assert that there was no transfer to them by the bankrupt. Indeed the only thing handed to them by the bankrupt was the note but the law is not so un-

sophisticated as to overlook transfers in trust for the benefit of a person. Section 1 (30) of the Bankruptcy Act provided in part:

> "Transfer shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein. . . ."

A transfer in trust is an indirect transfer. Appellees were not named in the Trust Agreement as beneficiaries by the express use of the word beneficiary but the Agreement (Tr. Rec. pp. 27 et seq.) provides that the Bankrupt was to collect receipts of the business and turn them over to the trustee who was to set aside 20% for Appellee. It would strain credulity to deny that Appellees were beneficiaries of the transfers and the obligations undertaken by the Bankrupt.

II. THE CONSIDERATION FURNISHED BY APPELLEES WENT TO MRS. LANNIN AND NOT TO THE BANKRUPT.

We have previously indicated that it is meaningless to talk of consideration for the note alone where a larger transaction is in question. Appellees protestations of a sufficient consideration for the note require no further answer. In our opening brief we detailed the lack of consideration for the entire October transaction. Appellees brief contains a statement in which is said (with the emphasis of italics) something which is important. Appellees surrendered the warehouse receipts to the warehouseman for reissuance to Mrs.

Lannin. Page 8 of Brief of Appellees commencing at line 2 says:

> "As a part of the same October transaction but necessarily prior thereto (by reason of the recitals contained in the Trust Agreement) the bankrupt and wife had executed, in favor of Appellees, the promissory note for $28,000 (Defendants Ex. B T.R. p. 143) and Mrs. Lannin had endorsed and guaranteed the payment of that note to Appellees. *In consideration for such guarantee,* Appellees had surrendered the warehouse receipts (which they had theretofore held as security for the bankrupt's admitted obligations equalling the amount of the promissory note) so that the warehouse company could and did reissue warehouse receipts covering the lumber then in the field warehouse in the name of, and delivered same to Mrs. Lannin as security for her said guarantee to Appellees." (Emphasis that of Appellees.)

Thus the consideration for Appellees acts in the October transaction was the act of Mrs. Lannin and not the transfers in trust and obligations of the Bankrupt.

As the Bankrupt's acts in October constituted one transaction it should be so regarded by the court and even though the note standing alone would have been valid, the making and delivery thereof should be set aside as being part of a fraudulent transaction.

Bank of Orland v. Harlan, 188 Cal. 413, 421-422;

Wells v. Girling, 1 Broderip and Bingham 447, 129 Eng. Reps. Reprint 795;

1 *Cal. Jur.* 2d, "Bills and Notes", Sec. 49, p. 380.

III. THE BANKRUPT WAS INSOLVENT AT THE TIME OF THE OCTOBER TRANSACTION.

Appellant's opening brief at pages 16 and 17 contains the computations under which we claim that the trial courts finding of solvency was untenable. Brief of Appellees at page 9, point 4 and footnote 1 contains their answer. The only difference concerns the amount the Bankrupt owed Mrs. Lannin. Appellants claim it was at least $13,000. Appellees point to the testimony of the Bankrupt's Accountant Joel Baum in the transcript of record at pages 221 and 270 to show it was only $7,000. An examination of page 220 discloses the following:

> "Mr. Jacobs. Q. Can you tell us Mr. Baum, what the business owed at the time of this examination of its affairs in September?
>
> A. It was in excess of $50,000.
>
> Q. Can you give us the exact figure or approximate it?
>
> A. Yes. Approximately there was roughly $28,000 owed to the Twin City Lumber Co. The others payable, I'd say, were in the neighborhood of $12,000 or $13,000, something like that. The unpaid balances on the equipment contracts were in excess of $4,000 and at that time, *just on the business operation of the Pine Supply business by Mr. Elliff as the sole proprietor, he owed his mother-in-law Mrs. Lannin, $7,000.*
>
> Q. Now you have enumerated all the liabilities that have appeared on the records of the business?
>
> A. Those were the only liabilities that would appear on the company records. Any sums that he might have borrowed from other people and

that I had no knowledge of would not appear on the books of the account for the Pine Supply business."

It appears then that the bankrupt's accountant could and did testify only as to liabilities the bankrupt disclosed to him relating to the Pine Supply business. Mr. Baum again refers to $7,000 owing at page 270 of the transcript.

Under cross-examination of Mr. Shapro, the Bankrupt testified (Tr. Rec. pp. 342, et seq.) as follows:

"Q. Now Mr. Elliff, in October, 1953, at the time of this meeting and the inspection of the books, whom did you owe money to other than the creditors of Pine Supply Company?

A. Personally you mean?

Q. Yes.

A. Mrs. Lannin, the Bank of America, Charles Lamb, maybe some small bills around—that wouldn't amount to——

Q. How much did you owe at that time, in October, the end of September—I am not trying to confuse you——

A. That's all right.

Q. ——how much did you owe Mrs. Lannin?

A. Yes sir.

Q. How much?

The Court. Mrs.?

Q. (By Mr. Shapro). Mrs.?

A. That had grown to about $18,000 about that time.

Q. By that time it had grown to about $18,000?

A. Yes.

Q. That was not recorded in the books of the Pine Supply Company.

A. Only $7,000, I believe, was ever recorded there because it was put into the business directly.

Q. And, as a matter of fact, the $7,000 wasn't put in the books of the Pine Supply Company until December 31, 1953, was it?

A. I would have no knowledge of that.

Q. Then to your best recollection, all of the indebtedness to Mrs. Lannin, other than possibly $7,000 was not recorded in the books of the Pine Supply?

A. No."

Appellees apparently have mistaken the obligation to Mrs. Lannin shown on the books of the company for the full amount of money owed to Mrs. Lannin. Mrs. Lannin also testified that the debt to her in October was $13,000. (Tr. Rec. p. 428.)

CONCLUSION.

This case fails in an area of the law where there is little if any case authority for the propositions presented. We are asking the court to determine the meaning of the Statutes we set forth in our opening brief. We feel that upon consideration the court below was in error in failing to find that the type device used here was not permissible because it was unfair to the creditors of the Bankrupt. There were transfers made by an insolvent without fair consideration and these transfers and obligations left the Bankrupt without sufficient capital to carry on his business. The bankrupt intended to conceal these transfers from other creditors and appellees who had

knowledge of this intent. After the transfers the Bankrupt retained possession of his business and to other creditors and the general public was the apparent owner. This the law forbids.

We respectfully urge the court to reverse the decision of the court below.

Dated, San Jose, California,
October 18, 1957.

Respectfully submitted,
C. Huntington Jacobs,
Daniel R. Cowans,
Robert N. Jacobs,
By Daniel R. Cowans,
Attorneys for Appellants.